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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38902-9-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON L. WOODS,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge
Cause No. 08-1-02094-4

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

P.M. 8-25-2009

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to dismiss count I, robbery in the first degree while armed with a firearm, for insufficient evidence.
02. The trial court erred in imposing a firearm sentencing enhancement.
03. The trial court erred in failing to dismiss count III, unlawful possession of a firearm in the first degree, for insufficient evidence.
04. The trial court erred in imposing a firearm sentencing enhancement where robbery committed with a firearm. (Woods adopts and incorporates by reference Appellant Baxter's argument)

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to support Woods's criminal conviction for robbery in the first degree while armed with a firearm where the person with the ownership interest in the property taken was without knowledge of the taking that was not prevented by force or fear? [Assignment of Error No. 1].
02. Whether there was sufficient evidence to support the imposition of a firearm enhancement where the State failed to prove that Woods or an accomplice was armed with an operational firearm? [Assignment of Error No. 2].

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03. Whether there was sufficient evidence to support Woods's criminal conviction for unlawful possession of a firearm in the first degree where the evidence indicated the firearm could not be operated? [Assignment of Error No. 3].
04. Whether the imposition of a firearm enhance violates double jeopardy where the underlying offense of robbery was committed with a firearm? (Woods adopts and incorporates by reference Appellant Baxter's argument) [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Jason L. Woods (Woods) was charged by fourth amended information filed in Thurston County Superior Court on February 3, 2009, with robbery in the first degree while armed with a firearm, count I, attempted burglary in the first degree while armed with a firearm, count II, unlawful possession of a firearm in the first degree, count III, and vehicle prowling in the second degree, count IV, contrary to RCWs 9A.10.040(1)(a), 9A.53.033(3), 9A.60.020, 9A.28.020, 9A.52.020(1), 9A.52.100(1) and 9A.56.200(1)(a)(i)(ii). [CP 37-38].

The court denied Woods's pretrial motion to suppress evidence under CrR 3.6(a). [CP 151-52]. Woods stipulated that he had previously been convicted of a serious offense. [RP CP 36].

Trial to a jury commenced on February 2, 2009, the Honorable Richard D. Hicks presiding.¹ Neither exceptions nor objections were taken to the jury instructions. [RP 446-47].² The jury returned verdicts of guilty, including enhancement, on all but count II (attempted burglary), Woods was sentenced within his standard range and timely notice of this appeal followed. [CP 126, 129, 131-145].

01. Substantive Facts

On November 18, 2008, at approximately 8:00 in the morning, a residence in Thurston County occupied by Russel Molnar and Cary Swofford was surrounded by numerous males wearing caps and hoodies. [RP 217, 344]. Molnar saw one of the individuals remove a CD player belonging to Swofford from a vehicle parked outside. [RP 221, 225, 234, 273, 340]. When these individuals were refused entry into the residence, somebody outside “tested the handle.” [RP 279]. A person, later identified as Woods, subsequently cocked and pointed a gun at the door. [RP 192, 212]. “It looked like he cocked it up.” [RP 284]. He was the “one that pretty much (did) all the talking outside, jumping around, waiving his hands.” [RP 235].

¹ Woods was tried with four co-defendants: Brian Winter, Rigoberto Contreras, Timothy Baxter and Toby Anderson.

² All references to the Report of Proceedings are to the transcripts entitled VOLUMES I-IV.

It looked like they cocked the gun and it looked like they were going to shoot at the door. Looked like they were going to shoot the doorknob off or something. I don't know.

[RP 234].

Molnar and Swofford were scared and frightened. [RP 189, 213, 238, 280, 345-46].

While en route to the scene from a couple of miles away, Deputy Cameron Simper stopped a car driven by Rigoberto Contreras, which contained the other four co-defendants. [RP 96, 98-100]. Woods, who denied any involvement in the events at the residence, told Simper that he had thrown a shotgun out of the car window when he was told to do so after it had been passed to him in the front passenger seat from one of the three passengers in the backseat. [RP 130, 136-37].

The stolen CD player was located in the vehicle and an unloaded sawed-off shotgun was retrieved from a "grassy ditch" along the road. [RP 101, 107-09, 184-85].

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D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD WOODS'S CRIMINAL CONVICTION FOR ROBBERY IN THE FIRST DEGREE WHERE THE PERSON WITH THE OWNERSHIP INTEREST IN THE PROPERTY TAKEN WAS WITHOUT KNOWLEDGE OF THE TAKING THAT WAS NOT PREVENTED BY FORCE OR FEAR.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Under RCW 9A.56.190, a person commits robbery by unlawfully taking personal property from another or in his presence against his will

by the use or threatened use of immediate force to take or retain the property. The person from whom or from whose presence the property is taken must have an ownership, representative, or possessory interest in the property. State v. Tvedt, 153 Wn.2d 705, 714, 107 P.3d 728 (2005). A taking “constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.” RCW 9A.56.190. It is the State’s burden to prove that the defendant communicated, directly or indirectly, the intent to use immediate force beyond a reasonable doubt. RCW 9A.56.190; RCW 9A.04.110(27).

The pertinent facts are not in dispute. Cory Swofford, the owner of the stolen CD player, was scared because she thought she may have seen a gun, though she did not see nor hear anyone take anything. [RP 350-51]. She candidly admitted she was unaware that anything had been taken, let alone her CD player, until after the defendants had left the scene: “That’s correct.” [RP 372].

The evidence did not explicitly or implicitly prove the use of force in connection with an intent to take or retain the CD player or that any alleged force or threat prevented Swofford from being aware that the CD player was taken from the property, for such was not employed in this manner. Ironically, if not strangely, there was no evidence that the

defendants, either individually or collectively, were aware if Swofford even knew that the CD player was removed from the vehicle, and, as important if not more so, no evidence that Swofford knew that anything had been taken. This was not a robbery.

Under these facts, Woods's conviction for robbery in the first degree must be reversed and the case dismissed.

02. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF A FIREARM ENHANCEMENT WHERE THE STATE FAILED TO PROVE THAT WOODS OR AN ACCOMPLICE WAS ARMED WITH AN OPERATIONAL FIREARM.³

A defendant is subject to a firearm sentencing enhancement under RCW 9.94A.533 if the defendant or an accomplice was armed with a firearm during the commission of the underlying offense. The State must prove each element of the enhancement beyond a reasonable doubt. State v. Hennessey, 80 Wn. App. 190, 194, 907 P.2d 331 (1995).

As instructed in this case, for sentencing enhancement purposes, a firearm "is a weapon or device from which a projectile may be fired by an

³ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for sufficiency of the evidence presented earlier in this brief is hereby incorporated by reference.

explosive such as gunpowder.” [Instruction No. 62; CP 118]. See State v Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (“a jury must be presented with sufficient evidence to find a firearm operable ... in order to uphold the enhancement”).

There was an absence of proof, as in none, that the gun introduced at trial, State’s exhibit 25, was operable: (1) it wouldn’t test fire [RP 314], (2) firing pin had been removed [RP 314], (3) expert couldn’t say would operate even with firing pin [RP 316, 321], (4) trigger housing may lack set pins. [RP 314-15].

Additionally, under these facts, it cannot be argued, as it must be for sentencing enhancement purposes, that at the time of the commission of the offense, State’s exhibit 25 was easily accessible and readily available for use, either for offensive or defensive purposes. State v. Willis, 153 Wn.2d 366, 371, 103 P.3d 1213 (2005). The State’s expert made this clear: “What I’m saying is it won’t work.” [RP 319].

The firearm enhancement must be stricken and the case remanded for resentencing.

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03. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT WOODS CRIMINAL CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE WHERE THE EVIDENCE INDICATED THE FIREARM COULD NOT BE OPERATED.⁴

As instructed in this case, “A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” [Instruction No. 13; CP 64]. Under this definition, a gun must be operable, and the State has the burden to prove operability. In State v. Padilla, 95 Wn. App. 531, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999), Division I of this court, while holding that “a disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1),” Id., at 535, noted that “‘may be fired’ indicates legislative intent that a gun rendered permanently inoperable is not a firearm under the statutory definition(.)” Id. In other words, Padilla requires operability when the evidence, as previously set forth herein supra at page 8, indicates the weapon could not be operated.

⁴ Again, for the sole purpose of avoiding needless duplication, the prior discussion relating to the test for sufficiency of the evidence presented earlier in this brief is hereby incorporated by reference.

The State's expert , in addition to his observations previously cited, wrote in his report that ““(t)he listed firearm (State's exhibit 25) is not capable of firing a projectile as designed by the manufacturer.” [RP 320]. In contrast, the “unrefuted testimony” in Padilla indicated that the disassembled weapon “could be reassembled in a matter of seconds.” Padilla, 95 Wn. App. at 535.

State's exhibit 25, the weapon admitted into evidence in this case, could not be operated, with the result that Woods's conviction for unlawful possession of a firearm must be reversed and dismissed.

04. WOODS ADOPTS AND INCORPORATES
BY REFERENCE THE ARGUMENT OF
APPELLANT BAXTER REGARDING
DOUBLE JEOPARDY FOR THE FIREARM
ENHANCEMENT FOR ROBBERY
COMMITTED WITH A FIREARM.

Where cases are consolidated for review, a party may adopt by reference any part of the brief of another. RAP 10.1(g)(2). Woods adopts and incorporates Baxter's argument regarding double jeopardy for the firearm enhancement for robbery committed with a firearm.

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E. CONCLUSION

Based on the above, Woods respectfully requests this court to reverse and dismiss his convictions for robbery in the first degree and unlawful possession of a firearm in the first degree and/or to remand for resentencing to vacate the firearm enhancement consistent with the arguments presented herein.

DATED this 25th day of August 2009.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne
Deputy Pros Atty
2000 Lakeridge Drive S.W.
Olympia, WA 98502

Jason L. Woods #783965
W.S.P.
1313 North 13th Avenue
Walla Walla, WA 99362

DATED this 25th day of August 2009.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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